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No. 85-5319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE JASPER DARDEN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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EDITOR'S NOTE

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STATEMENT OF THE CASE

In its brief, the state argues and relies upon a number of factual premises that are controverted by the record. Some of these factual questions concern issues of guilt or innocence and, thus, relate to

the issue of prejudice -- if that question is in fact relevant to this case. Others form the basis of the state's arguments that there are putative jurisdictional defects or procedural bars that would prevent the Court from reaching the merits of the prosecutorial argument issue. Finally, the state makes incorrect assertions about what the courts below found concerning the facts surrounding the questioning of venireperson Murphy. In the sections that follow, we present what the record and the courts below actually said about these factual issues. The factual and legal errors that dispose of the state's putative jurisdictional and procedural points are set out in the argument sections that follow.

A. The Unreliability of the Identification Testimony

The state says that: "Mrs. Turman never told the officers that she could not remember what Darden looked like." Res. Br. at 7. The police report, reproduced as an appendix to this reply brief, indicates the contrary. In it, the officer reported that: "Mrs. Turman stated she could not remember what the subject looked like or what he was wearing." Appendix at ii.

The contemporaneous report of the police officer was corroborated by Mrs. Turman's trial testimony. When asked about her statement to the investigating officer, she replied: "I recall telling him as for giving a definite description, I am a poor hand at doing it; but I do remember faces. But to describe someone I can't really do it." R. 232.[1] Mrs. Turman

[1] In her deposition, she testified that: "I won't say exact [sic] because I just never

also testified that, when asked by the investigating officer whether she could identify the assailant, she replied: "I would try, I would try; I might -- I don't know." R. 233.

The testimony that Mrs. Turman "very definitely did remember faces," Res. Br. at 7, is particularly injurious to the state's arguments in support of the reliability of Mrs. Turman's in-court identification of Mr. Darden. For, at trial, she was certain that her identification of Mr. Darden at the preliminary hearing was made when she "saw his face ... on my way up to the stand." R. 283. Her deposition testimony similarly stated

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was a type person to look, really look people over to give a description." Deposition of Helen Lee Turman at 4 (Oct. 31, 1973).

Citations to R. ____ are to the trial record; A.R. ____ to the record on appeal to the Florida Supreme Court; J.A. ____ to the Joint Appendix; and Supp. J.A. ____ to the Supplemental Joint Appendix.

that she identified Mr. Darden at the preliminary hearing by "the look on his face." Deposition of Helen Lee Turman at 28 (Oct. 31, 1973). But her testimony at the preliminary hearing -- when Mr. Darden was the only black man in the courtroom -- was very different indeed: "Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, 'That's him.'" A.R. 53 (emphasis added).

The state also attempts to bolster the problematic identification testimony by recalling that Mrs. Turman did not read any newspaper accounts and was not shown any photographs of Mr. Darden prior to the preliminary hearing. Res. Br. at 8-9. That, of course, is true. But it was Philip Arnold who read newspaper accounts of the incident and whose pretrial identification was thus tainted. Arnold twice admitted that he read newspaper

accounts of the incident, R. 458 and 462, and Mr. Darden's picture was in fact published in the local paper along with the reporting of the crime. See Deposition of Helen Lee Turman at 21.[2]

B. The Evidence Regarding the Gun

In its brief, the state cites and relies on the testimony of its firearms expert that "it was his expert opinion that [the bullet] could have been fired from that particular weapon." Res. Br. at

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[2] There is other evidence, developed at the federal habeas hearing, that raises serious doubt about Mr. Darden's guilt. Mrs. Turman testified that she called the operator to report the murder while the assailant was still on the premises -- indeed, that she went in to make the call before the last shot was fired. R. 212, 243. The call to the police was logged in at 6:31 P.M. Supp. J.A. 56. The accident, which according to the state's theory occurred while Mr. Darden was trying to make his escape, took place 3.4 miles from the Turman store. Supp. J.A. 59-60. The County Sheriff's office, however, received a telephone call reporting Mr. Darden's car accident at 6:32 P.M. Supp. J.A. 57. It is not possible to traverse 3.4 miles by car in less than one minute.

6 (citing R. 347). The expert's conclusion was premised on the rifling marks on the bullet, which matched the boring of the gun barrel. Id. at 6-7. But the state does not disclose that in the same sentence in which that firearm expert made the modest claim that the bullet could have come from the gun found near the scene of Mr. Darden's car accident, he also said that "there were not sufficient individual characteristic marks to determine positively whether this bullet had been fired from State's Exhibit No. 1...." R. 347. Moreover, he admitted that the bullet could have been fired from any similar Smith & Wesson, of which there are a large number. As he testified:

> A. It would have been fired from another Smith & Wesson.
>
> Q. It could have been fired from any weapon similar to this?
>
> A. Yes.
>
> Q. A rebored?

A. Yes, sir, Smith & Wesson, yes. Most of them have the same rifling.

Q. Could that bullet have been fired from a .38 special?

A. Yes, sir.

Q. A normal Smith Wesson .38 special?

A. Yes, sir.

Q. Do you have any idea how many of these weapons are in existence in this country?

A. A large number.

R. 357-58 (emphasis added).[3]

C. The Voir Dire of Venireperson Murphy

The state claims that upon remand, the Eleventh Circuit embraced the theory of Judge Fay's earlier dissent, Darden

[3] Of course, petitioner has never denied that the gun introduced at trial had been fired in a sequence similar to the shooting during the crime. Compare Pet. Br. at 2 with Res. Br. at 7. But, there was nothing but circumstantial evidence either to tie petitioner to the gun or the gun to the crime.

v. Wainwright, 725 F.2d 1526, 1560 (11th Cir. 1984) (en banc); J.A. 356-57. That dissent contended that venireperson Murphy did not really answer the question put to him by the trial judge, but rather answered a different, constitutionally correct question asked earlier in the voir dire. Res. Br. at 32-33 & n. *. But the Eleventh Circuit did not advance this theory in its opinion on remand. To the contrary, the per curiam opinion below focused upon the question actually asked Murphy and held that although it "may not have been ideal, we cannot conclude that it was inconsistent with the 'substantial impairment' test articulated in Witt." Darden v. Wainwright, 767 F.2d 752, 754 (11th Cir. 1985) (en banc); J.A. 378.

As noted in the opinion of the en banc majority prior to remand, Mr. Murphy was not in the jury box before he was examined

and none of the judge's earlier questions was directed at him. 725 F.2d at 1531; J.A. 309.[4]

> [W]e cannot assume that Mr. Murphy heard the correct articulation of the Witherspoon standard or that, if he heard it, he remembered it and knew

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[4] The actual selection of the jury in this case took place in the following manner: twelve members of the array were called to the jury box (R. 31-32), and were questioned both individually and as a group by the judge, the prosecutor, and defense counsel; whenever one of the twelve was stricken, another member of the array was called to the jury box to bring the number of prospective jurors in the box back to twelve (e.g., R. 83-84, 103-05, 130); and whenever one of these was stricken, yet another member of the array was added to the jury box to keep the number at twelve (e.g., R. 139, 150, 159, 165, 166). Although the twelve jurors in the box at any given time were questioned both individually and as a group, no member of the array outside the box was questioned at any time.

Murphy was the next to last member of the array to be placed in the box before selection of the jury was completed. He was questioned individually the moment he was seated in the box, and gave the answer that resulted in his exclusion (R. 165). Not having been in the jury box earlier, he had not been the subject of any questioning prior to that time.

> it to be the correct statement of the question when he was later questioned incorrectly.

Id. at 1532; J.A. 309. The subsequent per curiam opinion upon remand neither abandoned this reasoning nor embraced the theory of Judge Fay's dissent at which it was aimed. The state is perfectly free to advance that highly tenuous theory on its own, but cannot honestly claim that it bears the approval of the court below.

ARGUMENT

I. THERE ARE NO JURISDICTIONAL NOR PROCEDURAL BARS THAT WOULD PREVENT THE COURT FROM REACHING THE MERITS OF THE PROSECUTORIAL ARGUMENT ISSUE

In an attempt to avoid defending the indefensible, the state raises, first, a putative jurisdictional bar and, second, an alleged procedural default. We dispose of each in turn.

A. The Issue of Improper Prosecutorial Argument as It Relates to Sentence Was Raised in the Courts Below

The state argues that the decision of the court of appeals below discussed only whether the prosecutor's improper arguments deprived petitioner of fundamental fairness in the determination of his guilt or innocence. It further asserts that: "Although Darden has in one from or another claimed that the closing arguments affected sentencing, the issue he originally framed to the district court was one directed solely to the effect the remarks had on the determination of guilt or innocence." Res. Br. at 15. On these bases, the state argues that the judgment under review concerns the due process but not the eighth amendment attack on the improper prosecutorial argument. Id. at 14-16.

The state's reconstruction of the "not pressed nor passed upon" rule, see Illinois v. Gates, 462 U.S. 213, 217-24 (1983) (appeal from state court judgment), is both legally and factually flawed. Legally, the content of the judgment under review is not synonymous with the issues actually discussed by the court below. Cf. Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("And our power is to correct wrong judgments, not to revise opinions."). Rather, it is a function of the issues "raised[] and presented to the [lower] court....", Murdock v. City of Memphis, 87 U.S. (20 Wall) 590, 636 (1875); if the issue was properly raised, it is sufficient "that its decision was necessary to the judgment or decree, rendered in the case." Id.

The state's factual premise is equally unsustainable. The original habeas petition filed in the district court claimed that:

> Petitioner Willie Jasper Darden's conviction and sentence were obtained and imposed in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, for each of the reasons set forth more fully below. ...
>
> Within less than thirty-five transcript pages, the prosecutor time and again focused the jurors' attention upon the Florida Division of Corrections as that "unknown defendant" who, through the weekend furlough granted to petitioner, had turned him loose "on the public." (A. 12-13, 14-15); invited a conviction for first degree murder and the recommendation of a death sentence as "the only way that I know that he [the defendant] is not going to get out on the public" (A. 16); and expressed his "wish that the Division of Corrections was sitting in the chair ... with him [Darden]" (A. 36).

Petition at 4 (emphasis added). At the insistence of respondent, the issue was subsequently clarified and presented in

unmistakeable terms:

> Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth Amendment, and was imposed in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it was based upon proceedings in which the prosecutor was permitted to urge a death sentence upon grounds that were couched in inflammatory argument of the prosecuting attorney and improper professional conduct....

J.A. 196 (Magistrate's Report and Recommendation). The magistrate noted with particularity that: "Respondent has raised no objection to the inclusion of these ... claims...." J.A. 198.

Thus, it is clear that there is no jurisdictional defect. The most that can be said is that the Court lacks the benefit of a decision below on the eighth amendment claim. While the Court might vacate the judgment and remand for reconsideration in light of Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231 (1985), that is not called for in this

case because there are no facts relevant to the question presented undeveloped in this record. Compare Singleton v. Wulff, 428 U.S. 128, 120-21 (1976).

B. There Is No Procedural Default Barring Review of the Merits of the Prosecutorial Argument Claim

The state argues that the improper prosecutorial argument must be considered in light of the purported lack of objection and the alleged tactical decision of counsel not to object. Res. Br. 24-25. The state, however, candidly admits that not one of the courts below -- including the Florida Supreme Court -- has ever accepted the procedural default argument as a bar to reaching the merits of this claim. Res. Br. at 17 n.*. The court of appeals, for example, rejected the procedural default argument for two reasons.

> First, Darden's counsel did object twice during the prosecutor's final

> argument. Second, on direct appeal of Darden's conviction and sentence the Florida Supreme Court considered the issue. It is well settled that where a state appellate court has adjudicated an issue on its merits, federal courts may consider it in a petition for habeas corpus. ... The state's suggestion that the Florida Supreme Court did not dispose of the issue on its merits is untenable.

J.A. 271-72 (citations and footnotes omitted).[5] Similarly, the magistrate twice relied on the fact that there were objections, J.A. 204 & 214, and the district court concluded that because the Florida Supreme Court determined the issue on the merits, it could reach the merits itself on authority of this Court's decision in County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). J.A. 240.

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[5] In an omitted footnote, the court of appeals again noted "the fact that counsel did object, however inartfully." J.A. 272 at n.3.

The state nevertheless invites this Court to reexamine the question on the basis of testimony never credited by the courts below. Moreover, it fails to disclose that the version it advocates (Goodwill's) was disputed by the testimony of Goodwill's co-counsel Maloney, now a state court judge. Maloney was asked about Goodwill's testimony that he restrained Maloney from objecting to McDaniel's summation and that he did so for tactical reasons. Maloney denied it. J.A. 162. Rather, Maloney testified that he did object; that the first objection should have come at the time of White's improper expression of personal opinion (that is, long before Goodwill's alleged tactical decision to let McDaniel commit error); and that he did not object earlier solely because he "was not aware that it [the argument] was objectionable." J.A. 161-62. Indeed, Maloney disclaimed any

knowledge of Goodwill's tactical considerations.[6] Moreover, Maloney's habeas testimony flatly contradicted that of Goodwill with respect to other aspects of the trial.[7]

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[6] It should be noted that Maloney's version is more consistent with the trial record than is Goodwill's. First, Goodwill testified that the alleged tactical decision was premised on his prior experience that, unrestrained by objection, McDaniel would exceed the bounds of permissible argument. But Maloney is correct that the first unethical comment came during White's portion of the summation. Second, Goodwill testified that he restrained Maloney from objecting at a point early in McDaniel's argument because he knew that McDaniel would end his argument as soon as the first objection came. J.A. 46-47. In fact, however, Goodwill himself objected early in McDaniel's argument, J.A. 16; McDaniel nevertheless continued for some time. J.A. 16-32.

[7] Maloney testified that there was a one day continuance during the original trial that was necessary because Goodwill returned from drinking at 4 A.M. "obviously intoxicated." J.A. 164. Maloney attempted to awaken Goodwill at 7 A.M., but Goodwill did not appear for trial. At a conference in chambers, the trial judge "asked Mr. McDaniel, who is a good friend of Mr. Goodwill if Mr. Goodwill could function under those circumstances. Mr. McDaniel said no, no, he couldn't." J.A. 165. On that basis, the trial judge

In sum, the state is asking the Court to take the unprecedented step of resolving a credibility issue in the first instance, in the face of the state's failure to prevail on this point in any of the courts below. On the basis of this uncredited, controverted testimony, it asks the Court to decline to reach the merits -- a position that no court below, including the Florida Supreme Court, was willing to accept.

CONCLUSION

For the foregoing reasons, the Court should reach the merits of petitioner's claims and reverse the judgment of the court of appeals.

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granted a continuance.

Goodwill admitted drinking the night before, but claimed that he did not appear in court because he was suffering from a migraine headache. Supp. J.A. 39.

Respectfully submitted,

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